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**Filed**

JAN 17 2013

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE

*Fee paid*  
*SI* (99)

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

**CV 13- 0236**

**HRL**

KIM AVOY, individually and on behalf of  
all others similarly situated,

Plaintiff,

v.

TURTLE MOUNTAIN, LLC

Defendant.

Case No.

**CLASS ACTION AND REPRESENTATIVE  
ACTION**

**COMPLAINT FOR DAMAGES,  
EQUITABLE AND INJUNCTIVE RELIEF**

**JURY TRIAL DEMANDED**

Plaintiff, through the undersigned attorneys, brings this lawsuit against Defendant Turtle Mountain, LLC ("Turtle Mountain" or "Defendant") as to Plaintiff's own acts upon personal knowledge, and as to all other matters upon information and belief. To remedy the harm arising from Defendant's unlawful conduct, which has resulted in unjust profits, Plaintiff brings this action on behalf of a national class and a California subclass of consumers who, within the last four years, purchased Defendant's coconut products or its products labeled with the ingredient "Organic Dehydrated Cane Juice" or "Organic Evaporated Cane Juice." Defendant's coconut products and its products which list "Organic Dehydrated Cane Juice" or "Organic Evaporated Cane Juice" as an ingredient on their labels are referred to herein as "Misbranded Food Products."

## INTRODUCTION

1. Defendant Turtle Mountain is a privately held natural foods company which specializes in the creation of dairy free products. Turtle Mountain produces a variety of dairy free frozen desserts, beverages, and cultured products. Its two most prominent brands, So Delicious Dairy Free and Purely Decadent can be found in grocery stores and natural food stores in California and throughout the United States.

2. As part of its overall marketing strategy, Defendant recognizes that consumers desire to eat a healthier diet comprised of foods with no added sugar. Defendant similarly recognizes that consumers are willing to pay a premium for such healthy foods, and Defendant actively promotes the health benefits of its products. For example, Defendant's website, [www.sodeliciousdairyfree.com](http://www.sodeliciousdairyfree.com) makes the following representations regarding Defendant's products:

- In western society, the health benefits of coconuts are just beginning to be understood. The mystery appears to be in the favorable fats found in coconut.
- Although coconut contains saturated fat, a closer examination shows that not all saturated fats pose a health problem. Saturated fat chains exist in a variety of lengths which impact the body differently.
- Coconut represents a vegetarian-sourced saturated fat consisting of medium chain fatty acids (MCFA). Scientists have long recognized MCFA's such as lauric and capric acid for their anti-viral and anti-microbial properties. The body utilizes MCFA's as energy instead of storing them as fat.
- **COCONUT HEALTH BENEFITS & FACTS**

Here are just a few health benefits ascribed to coconut:

- Coconut consuming cultures around the world have lower incidence of heart disease than Americans.
- Lauric acid exists abundantly in coconut and plays a fundamental role in building our body's immune system. Once in our system it transforms into an antibacterial and antiviral substance called "monolaurin" which destroys viruses and diseases.
- Lauric acid also occurs naturally in human breast milk and

1 plays a vital role in nourishing and protecting babies from  
2 infections.

- 3 • MCFAs promote weight maintenance without raising  
4 cholesterol levels. They work best for preventing weight gain  
5 if you're not overweight or maintaining your new weight after  
6 a successful diet.

7 3. Turtle Mountain currently markets many different flavors and varieties of its  
8 soymilk and coconut milk products which list either "Organic Dehydrated Cane Juice" or "Organic  
9 Evaporated Cane Juice" as an ingredient. These products include the So Delicious Dairy Free brand  
10 soy milk frozen desserts in the following flavors: Peanut Butter Zig Zag, Mocha Almond Fudge,  
11 Mint Chip, Cookie Dough, Cookie Avalanche, Chocolate Peanut Butter, Butter Pecan, Creamy  
12 Vanilla, Dulce De Leche, Neapolitan, Mocha Fudge, Mint Marble Fudge, Chocolate Velvet,  
13 Pomegranate Chip, Pralines Pecan, Turtle Trails, Creamy Fudge Bars, Minis Organic Creamy  
14 Fudge Bars, Minis Neapolitan Sandwiches, Vanilla Sandwiches, and Minis Vanilla Sandwiches.  
15 Additionally, Turtle Mountain markets a variety of cultured coconut milk products which  
16 Defendant describes on its website as "yogurts" and whose labels list "Organic Evaporated Cane  
17 Juice" as an ingredient. These include Chocolate "Yogurt," Passionate Mango "Yogurt," Pina  
18 Colada "Yogurt," Plain "Yogurt," Raspberry "Yogurt," Strawberry "Yogurt," Vanilla "Yogurt,"  
19 Strawberry "Yogurt" Beverage, and Vanilla "Yogurt" Beverage. All of these products are  
20 misbranded for the reasons stated herein.

21 4. Although Defendant lists "Organic Dehydrated Cane Juice" or "Organic Evaporated  
22 Cane Juice" as an ingredient on the products indicated above, and on other products as well, the  
23 Food and Drug Administration ("FDA") has specifically warned companies not to use these terms  
24 because they are 1) "false and misleading;" 2) in violation of a number of labeling regulations  
25 designed to ensure that manufacturers label their products with the common and usual names of the  
26 ingredients they use and accurately describe the ingredients they utilize; and 3) the ingredient in  
27 question is not a juice.

28 5. Further, to be called "yogurt," a product must meet the FDA's Standard of Identity  
for yogurt, 21 C.F.R. § 131.200, which has been adopted by California. The Standard of Identity

1 for yogurt requires certain forms of milk in the manufacture of the product. Defendant's cultured  
 2 products described as "yogurt" on Defendant's website do not contain any form of milk as defined  
 3 in the Standard of Identity. All of Defendant's products labeled as "yogurt" do not contain the  
 4 ingredients required by the FDA's Standard of Identity and therefore are misbranded.

5 6. Additionally, the FDA's Standard of Identity for yogurt prohibits the inclusion of  
 6 any nutritive carbohydrate sweeteners not listed in the Standard of Identity:

7 sugar (sucrose), beet or cane; invert sugar (in paste or sirup form); brown  
 8 sugar; refiner's sirup; molasses (other than blackstrap); high fructose corn  
 9 sirup; fructose; fructose sirup; maltose; maltose sirup; dried maltose sirup;  
 10 malt extract; dried malt extract; malt sirup; dried malt sirup; honey; maple  
 11 sugar, or any of the sweeteners listed in part 168 of this chapter [21], except  
 12 table sirup.

13 7. In referencing "Organic Dehydrated Cane Juice" or "Organic Evaporated Cane  
 14 Juice" in its marketing materials, Defendant does not disclose the fact that "Organic Dehydrated  
 15 Cane Juice" and "Organic Evaporated Cane Juice" are, in their ordinary and commonly understood  
 16 terms known as, "sugar," and/or "dried cane syrup."

17 8. For example, on its website, Defendant displays the image and list of ingredients for  
 18 its Organic So Delicious Dairy Free Chocolate Velvet non-dairy frozen dessert as follows:



## Nutrition Facts

<b>Serving Size</b>	<i>1/2 cup (81g)</i>	
<hr/>		
<b>Amount Per Serving</b>		
<b>Calories</b>		130
<b>Calories from Fat</b>		30
<hr/>		
<b>Total Fat</b>	3.5g	5%
<b>Saturated Fat</b>	0.5g	3%
<b>Trans Fat</b>	0g	
<b>Cholesterol</b>	0mg	0%
<b>Sodium</b>	50mg	2%
<b>Potassium</b>	0mg	0%
<b>Total Carbohydrate</b>	23g	8%
<b>Dietary Fiber</b>	1g	4%
<b>Sugar</b>	14g	
<b>Protein</b>	2g	

% Daily Value\*

• Vitamin A

0%

• Vitamin C

0%

• Calcium

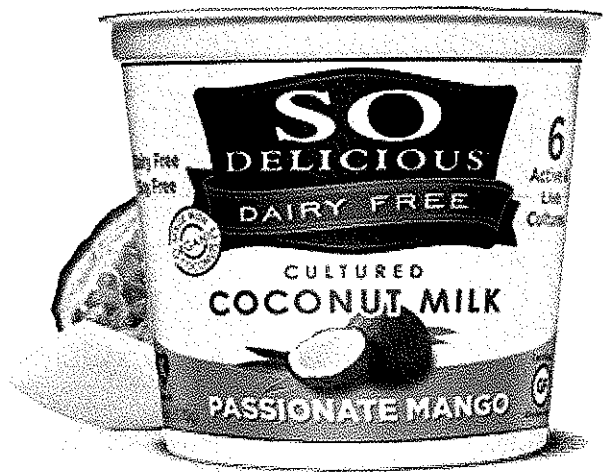
0%

• Iron

4%

**Ingredients:** ORGANIC SOYMILK (FILTERED WATER, ORGANIC SOYBEANS), ORGANIC DEHYDRATED CANE JUICE, ORGANIC BROWN RICE SYRUP AND/OR ORGANIC TAPIOCA SYRUP, ORGANIC SOYBEAN OIL AND/OR ORGANIC SAFFLOWER OIL, ORGANIC COCOA (PROCESSED WITH ALKALI), VANILLA EXTRACT, CAROB BEAN GUM, TAPIOCA SUGAR, GUAR GUM, CARRAGEENAN.

<http://sodeliciousdairyfree.com/products/soy-milk-ice-creams/chocolate-velvet> (webpage last visited December 20, 2012). The image and list of ingredients on Defendant's website for its So Delicious Dairy Free Cultured Coconut Milk Passionate Mango referenced as "Yogurt" appears as follows:



## Nutrition Facts

Serving Size	1 Container (170g)
<b>Amount Per Serving</b>	
<b>Calories</b>	130
<b>Calories from Fat</b>	60

% Daily Value\*

<b>Total Fat</b>	6g	9%
<b>Saturated Fat</b>	6g	30%
<b>Trans Fat</b>	0g	
<b>Cholesterol</b>	0mg	0%
<b>Sodium</b>	10mg	0%
<b>Potassium</b>	0mg	0%
<b>Total Carbohydrate</b>	20g	7%
<b>Dietary Fiber</b>	2g	8%
<b>Sugar</b>	16g	
<b>Protein</b>	1g	

• Vitamin A	10%
• Vitamin C	6%
• Calcium	25%
• Iron	6%
• Vitamin B12	

• Magnesium

30%

\*\* Comprised of 65% medium chain fatty acids (MCFAs)

25%

Ingredients: COCONUT MILK (COCONUT CREAM, WATER, GUAR GUM, XANTHAN GUM), ORGANIC EVAPORATED CANE JUICE, PASSIONFRUIT JUICE CONCENTRATE, MANGOES, PECTIN, CHICORY ROOT EXTRACT (INULIN), TAPIOCA DEXTROSE, ALGIN (KELP EXTRACT), MAGNESIUM PHOSPHATE, TRICALCIUM PHOSPHATE, ORGANIC RICE STARCH, LOCUST BEAN GUM, LIVE CULTURES, CITRIC ACID, NATURAL FLAVOR, CARRAGEENAN, DIPOTASSIUM PHOSPHATE, VITAMIN B12.

9. If a manufacturer is going to make a claim on a food label, the label must meet certain legal requirements that help consumers make informed choices and ensure that they are not misled. As described more fully below, Defendant has made, and continues to make, false and deceptive claims in violation of federal and California laws that govern the types of representations that can be made on food labels.

10. Identical federal and California laws regulate the content of labels on packaged food. The requirements of the federal Food Drug & Cosmetic Act ("FDCA") were adopted by the California legislature in the Sherman Food Drug & Cosmetic Law, California Health & Safety Code § 109875, *et seq.* (the "Sherman Law"). Under FDCA section 403(a), food is "misbranded" if "its labeling is false or misleading in any particular," or if it does not contain certain information on its label or its labeling. 21 U.S.C. § 343(a).

11. Under the FDCA, the term "false" has its usual meaning of "untruthful," while the term "misleading" is a term of art. Misbranding reaches not only false claims, but also those claims that might be technically true, but still misleading. If any representation in the labeling is misleading, the entire food is misbranded, and no other statement in the labeling can cure a misleading statement. "Misleading" is judged in reference to "the ignorant, the unthinking and the credulous who, when making a purchase, do not stop to analyze." *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 75 (9<sup>th</sup> Cir. 1951). Under the FDCA, it is not necessary to prove that anyone was actually misled.

12. Defendant has made, and continues to make, false and deceptive claims on its Misbranded Food Products in violation of federal and California laws that govern the types of representations that can be made on food labels. In particular, in making unlawful "Organic Dehydrated Cane Juice" and "Organic Evaporated Cane Juice" claims on its Misbranded Food



1 Products, Defendant has violated labeling regulations mandated by federal and California law by  
2 listing sugar and/or sugar cane syrups as "Organic Dehydrated Cane Juice" or "Organic Evaporated  
3 Cane Juice."

4 13. According to the FDA, the term "evaporated cane juice" is not the common or  
5 usual name of any type of sweetener, including sugar, sucrose, or dried cane syrup. Sugar or  
6 sucrose is defined by regulation in 21 C.F.R. §101.4(b)(20) and 21 C.F.R. §184.1854, as the  
7 common or usual name for material obtained from the crystallization from sugar cane or sugar beet  
8 juice that has been extracted by pressing or diffusion, then clarified and evaporated. Cane syrup is  
9 defined by regulation in 21 C.F.R. § 168.130. The common or usual name for the solid or dried  
10 form of cane syrup is "dried cane syrup."

11 14. Sugar cane products exist in many different forms, ranging from raw sugars and  
12 syrups to refined sugar and molasses. These products are differentiated by their moisture, molasses,  
13 and sucrose content as well as by crystal size and any special treatments. Sugar cane products are  
14 required by regulation (21 C.F.R. §101.4) to be described by their common or usual names, sugar  
15 (21 C.F.R. 101.4(b)(20) and 21 C.F.R. §184.1854 or cane syrup (21 C.F.R. 168.1340). Other sugar  
16 cane products have common or usual names established by common usage such as molasses, raw  
17 sugar, brown sugar, turbinado sugar, muscovado sugar and demerara sugar.

18 15. The FDA has instructed that sweeteners derived from sugar cane syrup should not  
19 be listed in the ingredient declaration by names which suggest that the ingredients are juice, such as  
20 "Dehydrated Cane Juice" or "Evaporated Cane Juice." The FDA considers such representations to  
21 be "false and misleading" under section 403(a)(1) of the FDCA (21 U.S.C. 343(a)(1)) because they  
22 fail to reveal the basic nature of the food and its characterizing properties (*i.e.*, that the ingredients  
23 are sugars or syrups) as required by 21 C.F.R § 102.5. Nevertheless, Defendant has made, and  
24 continues to make, false and deceptive claims on its Misbranded Food Products in violation of  
25 federal and California laws that govern the types of representations that can be made on food labels.

26 16. Defendant has made and continues to make unlawful drug and health claims on the  
27 labeling of its Misbranded Food Products that are prohibited by federal and California law and  
28 which render these products misbranded. These claims are unlawful and violate 21 C.F.R. §101.14



1 because the claims have not been approved by the FDA or the Defendant's products contain  
2 disqualifying nutrient levels. For example, the Defendant's cultured coconut milk has six grams of  
3 saturated fat, which is a disqualifying amount precluding the Defendant's unlawful health claims  
4 described above in paragraph 2. Under federal and California law, Defendant's Misbranded Food  
5 Products cannot legally be manufactured, advertised, distributed, held or sold. Defendant's false  
6 and misleading labeling practices stem from its global marketing strategy. Thus, the violations and  
7 misrepresentations are similar across product labels and product lines.

8 17. Defendant's violations of law include the illegal advertising, marketing, distribution,  
9 delivery and sale of Defendant's Misbranded Food Products to consumers in California and  
10 throughout the United States.

#### 11 PARTIES

12 18. Plaintiff Kim Avoy is a resident of Los Gatos, California who purchased Defendant's  
13 Misbranded Food Products during the four (4) years prior to the filing of this Complaint (the "Class  
14 Period").

15 19. Defendant Turtle Mountain Food Company is a Delaware corporation, and does  
16 business throughout California and the United States, with its principal place of business located at  
17 1130 Shelley Street, Springfield OR 97477. Turtle Mountain may be served with process of this  
18 Court by service on its California registered agent for service of process, Chris Kelly, 10100 Santa  
19 Monica Blvd., Suite 2200, Los Angeles, CA 90067-4120.

20 20. Defendant sells its Misbranded Food Products to consumers in grocery and other  
21 retail stores throughout California and the United States. Defendant has pursued a plan, design,  
22 and course of conduct to unlawfully advertise, market, distribute, deliver, and sell Defendant's  
23 Misbranded Food Products to consumers in California and throughout the United States.

#### 24 JURISDICTION AND VENUE

25 21. This Court has original jurisdiction over this action under 28 U.S.C. § 1332(d)  
26 because this is a class action in which: (1) there are over 100 members in the proposed class;  
27 (2) members of the proposed class have a different citizenship from Defendant; and (3) the claims  
28 of the proposed class members exceed \$5,000,000 in the aggregate.

22. The Court has jurisdiction over the federal claim alleged herein pursuant to 28 U.S.C. § 1331, because it arises under the laws of the United States.

23. The Court has jurisdiction over the California claims alleged herein pursuant to 28 U.S.C. § 1367, because they form part of the same case or controversy under Article III of the United States Constitution.

24. Alternatively, the Court has jurisdiction over all claims alleged herein pursuant to 28 U.S.C. § 1332, because the matter in controversy exceeds the sum or value of \$75,000, and is between citizens of different states.

25. The Court has personal jurisdiction over Defendant because a substantial portion of the wrongdoing alleged in this Complaint occurred in California, Defendant is authorized to do business in California, has sufficient minimum contacts with California, and otherwise intentionally avails itself of the markets in California through the promotion, marketing and sale of merchandise, sufficient to render the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

26. Because a substantial part of the events or omissions giving rise to these claims occurred in this District and because the Court has personal jurisdiction over Defendant, venue is proper in this Court pursuant to 28 U.S.C. § 1391(a) and (b).

### **FACTUAL ALLEGATIONS**

#### **A. Identical California And Federal Laws Regulate Food Labeling**

27. Food manufacturers are required to comply with identical federal and state laws and regulations that govern the labeling of food products. First and foremost among these is the FDCA and its labeling regulations, including those set forth in 21 C.F.R. § 101.

28. Pursuant to the Sherman Law, California has expressly adopted the federal labeling requirements as its own and indicated that “[a]ll food labeling regulations and any amendments to those regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date shall be the food regulations of this state.” California Health & Safety Code §110100.

29. In addition to its blanket adoption of federal labeling requirements, California has

also enacted a number of laws and regulations that adopt and incorporate specific enumerated federal food laws and regulations. For example, food products are misbranded under California Health & Safety Code § 110660 if their labeling is false and misleading in one or more particulars; are misbranded under California Health & Safety Code § 110665 if their labeling fails to conform to the requirements for nutrient labeling set forth in 21 U.S.C. § 343(q) and regulations adopted thereto; are misbranded under California Health & Safety Code § 110670 if their labeling fails to conform with the requirements for nutrient content and health claims set forth in 21 U.S.C. § 343(r) and regulations adopted thereto; are misbranded under California Health & Safety Code § 110705 if words, statements and other information required by the Sherman Law to appear on their labeling are either missing or not sufficiently conspicuous; are misbranded under California Health & Safety Code § 110735 if they are represented as having special dietary uses but fail to bear labeling that adequately informs consumers of their value for that use; and are misbranded under California Health & Safety Code § 110740 if they contain artificial flavoring, artificial coloring and chemical preservatives but fail to adequately disclose that fact on their labeling.

#### **B. FDA Enforcement History**

30. In recent years the FDA has become increasingly concerned that food manufacturers were disregarding food labeling regulations. To address this concern, the FDA elected to take steps to inform the food industry of its concerns and to place the industry on notice that food labeling compliance was an area of enforcement priority.

31. In October 2009, the FDA issued a *Guidance For Industry: Letter regarding Point Of Purchase Food Labeling* to address its concerns about front of package labels ("2009 FOP Guidance"). The 2009 FOP Guidance advised the food industry:

FDA's research has found that with FOP labeling, people are less likely to check the Nutrition Facts label on the information panel of foods (usually, the back or side of the package). It is thus essential that both the criteria and symbols used in front-of-package and shelf-labeling systems be nutritionally sound, well-designed to help consumers make informed and healthy food choices, and not be false or misleading. The agency is currently analyzing FOP labels that appear to be misleading. The agency is also looking for symbols that either expressly or by implication are nutrient content claims. We are assessing the criteria established by food manufacturers for such symbols and comparing them to our regulatory criteria.

1  
2 It is important to note that nutrition-related FOP and shelf labeling, while currently  
3 voluntary, is subject to the provisions of the Federal Food, Drug, and Cosmetic Act  
4 that prohibit false or misleading claims and restrict nutrient content claims to those  
5 defined in FDA regulations. Therefore, FOP and shelf labeling that is used in a  
6 manner that is false or misleading misbrands the products it accompanies. Similarly,  
7 a food that bears FOP or shelf labeling with a nutrient content claim that does not  
8 comply with the regulatory criteria for the claim as defined in Title 21 Code of  
9 Federal Regulations (C.F.R.) 101.13 and Subpart D of Part 101 is misbranded. We  
10 will consider enforcement actions against clear violations of these established  
11 labeling requirements. . .

12 ... Accurate food labeling information can assist consumers in making healthy  
13 nutritional choices. FDA intends to monitor and evaluate the various FOP labeling  
14 systems and their effect on consumers' food choices and perceptions. FDA  
15 recommends that manufacturers and distributors of food products that include FOP  
16 labeling ensure that the label statements are consistent with FDA laws and  
17 regulations. FDA will proceed with enforcement action against products that bear  
18 FOP labeling that are explicit or implied nutrient content claims and that are not  
19 consistent with current nutrient content claim requirements. FDA will also proceed  
20 with enforcement action where such FOP labeling or labeling systems are used in a  
21 manner that is false or misleading.

22 [http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments](http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm187208.htm)  
23 [/FoodLabelingNutrition/ucm187208.htm](http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm187208.htm)

24 32. The 2009 FOP Guidance recommended that “manufacturers and distributors of food  
25 products that include FOP labeling ensure that the label statements are consistent with FDA law and  
26 regulations” and specifically advised the food industry that it would “proceed with enforcement  
27 action where such FOP labeling or labeling systems are used in a manner that is false or  
28 misleading.”

33. Defendant knew or should have known about the 2009 FOP guidance.

34. Despite the issuance of the 2009 FOP Guidance, Defendant did not remove the  
unlawful and misleading food labeling claims from its Misbranded Food Products.

35. On March 3, 2010, the FDA issued an “Open Letter to Industry from [FDA  
Commissioner] Dr. Hamburg” (hereinafter, “Open Letter”). The Open Letter reiterated the FDA’s  
concern regarding false and misleading labeling by food manufacturers. In pertinent part the letter  
stated:

In the early 1990s, the Food and Drug Administration (FDA) and the food industry  
worked together to create a uniform national system of nutrition labeling, which

1 includes the now-iconic Nutrition Facts panel on most food packages. Our citizens  
2 appreciate that effort, and many use this nutrition information to make food choices.  
3 Today, ready access to reliable information about the calorie and nutrient content of  
4 food is even more important, given the prevalence of obesity and diet-related  
5 diseases in the United States. This need is highlighted by the announcement recently  
6 by the First Lady of a coordinated national campaign to reduce the incidence of  
7 obesity among our citizens, particularly our children.

8 With that in mind, I have made improving the scientific accuracy and usefulness of  
9 food labeling one of my priorities as Commissioner of Food and Drugs. The latest  
10 focus in this area, of course, is on information provided on the principal display  
11 panel of food packages and commonly referred to as "front-of-pack" labeling. The  
12 use of front-of-pack nutrition symbols and other claims has grown tremendously in  
13 recent years, and it is clear to me as a working mother that such information can be  
14 helpful to busy shoppers who are often pressed for time in making their food  
15 selections....

16 As we move forward in those areas, I must note, however, that there is one area in  
17 which more progress is needed. As you will recall, we recently expressed concern,  
18 in a "Dear Industry" letter, about the number and variety of label claims that may not  
19 help consumers distinguish healthy food choices from less healthy ones and, indeed,  
20 may be false or misleading.

21 At that time, we urged food manufacturers to examine their product labels in the  
22 context of the provisions of the Federal Food, Drug, and Cosmetic Act that prohibit  
23 false or misleading claims and restrict nutrient content claims to those defined in  
24 FDA regulations. As a result, some manufacturers have revised their labels to bring  
25 them into line with the goals of the Nutrition Labeling and Education Act of 1990.  
26 Unfortunately, however, we continue to see products marketed with labeling that  
27 violates established labeling standards.

28 To address these concerns, FDA is notifying a number of manufacturers that their  
labels are in violation of the law and subject to legal proceedings to remove  
misbranded products from the marketplace. While the warning letters that convey  
our regulatory intentions do not attempt to cover all products with violative labels,  
they do cover a range of concerns about how false or misleading labels can  
undermine the intention of Congress to provide consumers with labeling information  
that enables consumers to make informed and healthy food choices.

.....

These examples and others that are cited in our warning letters are not indicative of  
the labeling practices of the food industry as a whole. In my conversations with  
industry leaders, I sense a strong desire within the industry for a level playing field  
and a commitment to producing safe, healthy products. That reinforces my belief  
that FDA should provide as clear and consistent guidance as possible about food  
labeling claims and nutrition information in general, and specifically about how the  
growing use of front-of-pack calorie and nutrient information can best help



1 consumers construct healthy diets.

2 I will close with the hope that these warning letters will give food manufacturers  
3 further clarification about what is expected of them as they review their current  
4 labeling. I am confident that our past cooperative efforts on nutrition information  
5 and claims in food labeling will continue as we jointly develop a practical, science-  
6 based front-of-pack regime that we can all use to help consumers choose healthier  
7 foods and healthier diets.

8 [http://www.fda.gov/Food/LabelingNutrition/ucm202733.htm?utm\\_campaign=Google2&utm\\_source=fdaSearch&utm\\_medium=website&utm\\_term=Open Letter to Industry from Dr. Hamburg&utm\\_content=1](http://www.fda.gov/Food/LabelingNutrition/ucm202733.htm?utm_campaign=Google2&utm_source=fdaSearch&utm_medium=website&utm_term=Open+Letter+to+Industry+from+Dr.+Hamburg&utm_content=1)

9 36. Defendant continues to utilize unlawful food labeling claims despite the express  
10 guidance of the FDA in the Open Letter.

11 37. At the same time that it issued its Open Letter, the FDA issued a number of warning  
12 letters to companies whose products were misbranded as a result of their unlawful labels.

13 38. In its 2010 Open Letter to industry the FDA stated that the agency not only expected  
14 companies that received warning letters to correct their labeling practices but also anticipated that  
15 other companies would examine their food labels to ensure that they are in full compliance with  
16 food labeling requirements and make changes where necessary. Defendant did not change the  
17 labels on its Misbranded Food Products in response to these warning letters.

18 39. In addition to its general guidance about unlawful labeling practices, the FDA has  
19 issued specific guidance about the unlawful practices at issue here. In October of 2009, the FDA  
20 issued its *Guidance for Industry: Ingredients Declared as Evaporated Cane Juice*, which advised  
21 the industry that the term "Evaporated Cane Juice" was unlawful.

22 <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments>,

23 40. In addition to its guidance to industry in general, the FDA has repeatedly sent  
24 warning letters to specific companies regarding specific violations such as the ones at issue in this  
25 case. The FDA's July 2012 Regulatory Procedures Manual indicates that a warning letter  
26 "communicates the agency's position on a matter" and that "[w]arning Letters are issued only for  
27 violations of regulatory significance." The FDA publicly posted these letters on its website with the  
28 expectation that food manufacturers would revise their product labels to correct any violations  
outlined in these warning letters.

41. In particular, the FDA has issued warning letters to at least a half-dozen companies for utilizing the unlawful term “Evaporated Cane Juice.”

42. Defendant has continued to ignore the 2009 FOP Guidance which detailed the FDA’s guidance on how to make food labeling claims as well as the 2009 Guidance on Evaporated Cane Juice and the FDA warning letters on evaporated cane juice. As such, Defendant’s Misbranded Food Products continue to run afoul of the 2009 FOP Guidance and the 2009 Guidance on Evaporated Cane Juice and the FDA warning letters on evaporated cane juice as well as federal and California law.

43. Despite the numerous FDA warning letters and the 2009 Guidance on Evaporated Cane Juice or the FDA evaporated cane juice warning letters and the 2010 Open Letter, Defendant has not removed the unlawful and misleading food labeling ingredients from Defendant’s Misbranded Food Products.

44. Despite the FDA’s numerous warnings to industry, Defendant has continued to sell products bearing unlawful food labeling claims without meeting the requirements to make such claims.

45. Even in the face of direct FDA regulation that “Evaporated Cane Juice” is a “false and misleading” term, Defendant continues to use the term at the present time.

**C. Defendant’s Unlawful and Misleading Evaporated Cane Juice Claims Cause Defendant’s Food Products To Be Misbranded**

**1. “Dehydrated Cane Juice” or “Evaporated Cane Juice” Are Unlawful Terms Prohibited From Use On A Product Label Or In Its Ingredient List**

46. 21 C.F.R. §§ 101.3 and 102.5, which have been adopted by California, prohibit manufacturers from referring to foods by anything other than their common and usual names. 21 C.F.R. § 101.4, which has been adopted by California, prohibits manufacturers from referring to ingredients by anything other than their common and usual names. Defendant has violated these provisions by failing to use the common or usual name for ingredients mandated by law. In particular, Defendant has used and continues to use the term “Dehydrated Cane Juice” or “Evaporated Cane Juice” on products in violation of numerous labeling regulations designed to



1 protect consumers from misleading labeling practices. Defendant's practices also violate express  
2 FDA policies.

3 47. For example, Defendant violated the FDA's express policy with respect to the listing  
4 of certain ingredients such as sugar or dried cane syrup. As stated by the FDA, "FDA's current  
5 policy is that sweeteners derived from sugar cane syrup should not be declared as 'evaporated cane  
6 juice' because that term falsely suggests that the sweeteners are juice."

7 48. The FDA "considers such representations to be false and misleading under section  
8 403(a)(1) of the Act (21 U.S.C. 343(a)(1) because they fail to reveal the basic nature of the food  
9 and its characterizing properties (*i.e.*, that the ingredients are sugars or syrups) as required by 21  
10 U.S.C. 102.5."

11 49. In October of 2009, the FDA issued *Guidance for Industry: Ingredients Declared as*  
12 *Evaporated Cane Juice*, which that:

13 "...the term "evaporated cane juice" has started to appear as an ingredient on food  
14 labels, most commonly to declare the presence of sweeteners derived from sugar  
15 cane syrup. However, FDA's current policy is that sweeteners derived from sugar  
16 cane syrup should not be declared as "evaporated cane juice" because that term  
falsely suggests that the sweeteners are juice...

17 "Juice" is defined by 21 C.F.R. 120.1(a) as "the aqueous liquid expressed or  
18 extracted from one or more fruits or vegetables, purees of the edible portions of one  
or more fruits or vegetables, or any concentrates of such liquid or puree." ...

19 "As provided in 21 C.F.R. 101.4(a)(1), "Ingredients required to be declared on the  
20 label or labeling of a food . . . shall be listed by common or usual name . . . ." The  
21 common or usual name for an ingredient is the name established by common usage  
22 or by regulation (21 C.F.R. 102.5(d)). The common or usual name must accurately  
23 describe the basic nature of the food or its characterizing properties or ingredients,  
and may not be "confusingly similar to the name of any other food that is not  
reasonably encompassed within the same name" (21 C.F.R. 102.5(a))...

24 "Sugar cane products with common or usual names defined by regulation are sugar  
25 (21 C.F.R. 101.4(b)(20)) and cane sirup (alternatively spelled "syrup") (21 C.F.R.  
26 168.130). Other sugar cane products have common or usual names established by  
common usage (*e.g.*, molasses, raw sugar, brown sugar, turbinado sugar,  
muscovado sugar, and demerara sugar)...

27 "The intent of this draft guidance is to advise the regulated industry of FDA's view  
28 that the term "evaporated cane juice" is not the common or usual name of any type  
of sweetener, including dried cane syrup. Because cane syrup has a standard of

1 identity defined by regulation in 21 C.F.R. 168.130, the common or usual name for  
2 the solid or dried form of cane syrup is "dried cane syrup."...

3 "Sweeteners derived from sugar cane syrup should not be listed in the ingredient  
4 declaration by names which suggest that the ingredients are juice, such as  
5 "evaporated cane juice." FDA considers such representations to be false and  
6 misleading under section 403(a)(1) of the Act (21 U.S.C. 343(a)(1)) because they  
7 fail to reveal the basic nature of the food and its characterizing properties (i.e., that  
8 the ingredients are sugars or syrups) as required by 21 C.F.R. 102.5. Furthermore,  
9 sweeteners derived from sugar cane syrup are not juice and should not be included  
10 in the percentage juice declaration on the labels of beverages that are represented to  
11 contain fruit or vegetable juice (see 21 C.F.R. 101.30).

12 50. Despite the issuance of the 2009 FDA Guidance, Defendant has not removed the  
13 unlawful and misleading food labeling ingredients from its Misbranded Food Products.

14 51. Defendant often lists ingredients with unlawful and misleading names. The  
15 Nutrition Facts label of the Misbranded Food Products list "Organic Dehydrated Cane Juice" or  
16 "Organic Evaporated Cane Juice" as an ingredient. According to the FDA, "'evaporated cane  
17 juice' is not the common or usual name of any type of sweetener, including dried cane syrup." The  
18 FDA provides that "cane syrup has a standard of identity defined by regulation in 21 C.F.R.  
19 168.130, the common or usual name for the solid or dried form of cane syrup is 'dried cane syrup.'"  
20 Similarly, Sugar or sucrose is defined by regulation in 21 C.F.R. §101.4(b)(20) and §184.1854, as  
21 the common or usual name for material obtained from the crystallization from sugar cane or sugar  
22 beet juice that has been extracted by pressing or diffusion, then clarified and evaporated.

23 52. Various FDA warning letters have made it clear that the use of the term evaporated  
24 cane juice is unlawful because the term does not represent the common or usual name of a food or  
25 ingredient. These warning letters indicate that foods bearing labels which contain the term  
26 "Dehydrated Cane Juice" or "Evaporated Cane Juice" are misbranded.

27 53. Such products mislead consumers into paying a premium price for inferior or  
28 undesirable ingredients or for products that contain ingredients not listed on the label.

54. Defendant's false, unlawful and misleading ingredient listings render its products  
misbranded under federal and California law. Misbranded products cannot be legally sold, have no

1 economic value, and are legally worthless. Plaintiff and the class paid a premium price for the  
2 Misbranded Food Products.

3 55. Defendant has also made these illegal claims on its websites and in advertising in  
4 violation of federal and California law.

5 **2. The Standard Of Identity For Yogurt Does Not Permit The Use Of**  
6 **Evaporated Cane Juice As An Ingredient**

7 56. As a matter of law it is unlawful to use evaporated cane juice as an ingredient in  
8 yogurt.

9 57. The FDA's Standard of Identity for yogurt (21 C.F.R. § 131.200) prohibits the  
10 inclusion of any nutritive carbohydrate sweeteners not listed in the standard of identity. Evaporated  
11 cane juice is not included on the list of allowed sweeteners which is limited to:

12 "sugar (sucrose), beet or cane; invert sugar (in paste or sirup form); brown sugar; refiner's  
13 sirup; molasses (other than blackstrap); high fructose corn sirup; fructose; fructose sirup;  
14 maltose; maltose sirup, dried maltose sirup; malt extract, dried malt extract; malt sirup,  
dried malt sirup; honey; maple sugar; or any of the sweeteners listed in part 168 of this  
chapter [21], except table sirup."

15  
16 58. As discussed above, "Evaporated Cane Juice" is an unlawful term as it is merely a  
17 false and misleading name for another food or ingredient that has a common or usual name, namely  
18 sugar or dried cane syrup. However, to the extent that "Evaporated Cane Juice" is considered to be  
19 the common or usual name of a type of sweetener, that sweetener is not authorized for use in yogurt  
20 and Defendant's inclusion of "Evaporated Cane Juice" in its cultured products that it refers to as  
21 "yogurt" in violation of the prohibition to do so, precludes the product it is added to from being  
22 called or sold as yogurt.

23 **D. Defendant Has Violated California Law**

24 59. Defendant has violated California Health & Safety Code § 110390, which makes it  
25 unlawful to disseminate false or misleading food advertisements that include statements on  
26 products and product packaging or labeling or any other medium used to directly or indirectly  
27 induce the purchase of a food product.

28 60. Defendant has violated California Health & Safety Code § 110395, which makes it

1 unlawful to manufacture, sell, deliver, hold or offer to sell any falsely advertised food.

2 61. Defendant has violated California Health & Safety Code §§ 110398 and 110400,  
3 which make it unlawful to advertise misbranded food or to deliver or proffer for delivery any food  
4 that has been falsely advertised.

5 62. Defendant has violated California Health & Safety Code § 110660 because its  
6 product labeling is false and misleading in one or more ways.

7 63. Defendant's Misbranded Food Products are misbranded under California Health &  
8 Safety Code § 110670 because their labeling fails to conform with the requirements for nutrient  
9 content and health claims set forth in 21 U.S.C. § 343(r) and the regulations adopted thereto.

10 64. Defendant has violated California Health & Safety Code § 110760, which makes it  
11 unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is  
12 misbranded.

13 65. Defendant's Misbranded Food Products are misbranded under California Health &  
14 Safety Code § 110755 because the products are purported to be or are represented for special  
15 dietary uses, and their labels fail to bear such information concerning their vitamin, mineral, and  
16 other dietary properties as the Secretary determines to be, and by regulations prescribes as,  
17 necessary in order fully to inform purchasers as to its value for such uses.

18 66. Defendant has violated California Health & Safety Code § 110765, which makes it  
19 unlawful for any person to misbrand any food.

20 67. Defendant has violated California Health & Safety Code § 110770, which makes it  
21 unlawful for any person to receive in commerce any food that is misbranded or to deliver or proffer  
22 for delivery any such food.

23 68. Defendant has violated the standards set by 21 C.F.R. §§ 101.4 and 102.5 which has  
24 been incorporated by reference in the Sherman Law, by failing to include on its product labels the  
25 common and usual names of ingredients contained in its food products. Defendant has also  
26 violated the standards set by 21 C.F.R. §§ 101.3 and 131.200 by violating the Standard of Identity  
27 for yogurt. Additionally, Defendant has violated the standard set by 21 C.F.R. § 101.14 by making  
28 unlawful health claims about its products such as those referenced in paragraphs 2 and 16 above.

1           **F.     Plaintiff Purchased Defendant's Misbranded Food Products**

2           69.     Plaintiff cares about the nutritional content of food and seeks to maintain a healthy  
3 diet.

4           70.     During the Class Period, Plaintiff purchased the following of Defendant's  
5 Misbranded Food Products: So Delicious Cultured Coconut Milk. Plaintiff purchased the blueberry  
6 favored variety.

7           71.     Plaintiff would not have purchased Defendant's Misbranded Food Products had  
8 Plaintiff known that the Misbranded Food Products contained sugar or dried cane syrup. Plaintiff  
9 read and reasonably relied upon the labels on Defendant's Misbranded Food Products, including the  
10 ingredient "Organic Dehydrated Cane Juice" or "Organic Evaporated Cane Juice" on the back  
11 panels, before purchasing Defendant's products. Plaintiff also read and reasonably relied upon  
12 Defendant's unlawful and deceptive misrepresentations on Defendant's website before purchasing  
13 Defendant's products, including its unlawful coconut related health claims described in Paragraph 2  
14 above. Defendant's web address is printed on its package labels, and by law Defendant's website  
15 misrepresentations are incorporated in its labels.

16           72.     Plaintiff relied on Defendant's package labeling including the back panel ingredients  
17 list referencing "Organic Dehydrated Cane Juice" or "Organic Evaporated Cane Juice," and based  
18 and justified the decision to purchase Defendant's products in substantial part on Defendant's  
19 package labeling, including the labeling claiming that Defendant's product contained as an  
20 ingredient "Organic Dehydrated Cane Juice" or "Organic Evaporated Cane Juice" and that the  
21 Defendant's coconut products possessed certain health benefits detailed above in Paragraph 2.

22           73.     At point of sale, Plaintiff did not know, and had no reason to know, that Defendant's  
23 products were misbranded as set forth herein, and would not have bought the products had Plaintiff  
24 known the truth about them. Plaintiff would not have bought the Defendant's products had Plaintiff  
25 known they contained disqualifying high levels of saturated that barred the health claims made by  
26 Defendant.

27           74.     At point of sale, Plaintiff did not know, and had no reason to know, that Defendant's  
28 "Organic Dehydrated Cane Juice" or "Organic Evaporated Cane Juice" ingredient name was

1 unlawful and unauthorized as set forth herein. Had Plaintiff known this information, Plaintiff  
2 would not have bought the products.

3 75. Plaintiff did not know and had no reason to know that Defendant's Misbranded Food  
4 Products were misbranded and bore false food labeling claims despite failing to meet the  
5 requirements to make those food labeling claims. Had Plaintiff known this information, Plaintiff  
6 would not have bought the products.

7 76. In reliance on Defendant's "Organic Dehydrated Cane Juice" or "Organic  
8 Evaporated Cane Juice" ingredient name, Plaintiff and thousands of others in California and  
9 throughout the United States purchased the Misbranded Food Products at issue.

10 77. Defendant's labeling, advertising and marketing as alleged herein are false and  
11 misleading and were designed to increase sales of the products at issue. Defendant's  
12 misrepresentations are part of an extensive labeling, advertising and marketing campaign, and a  
13 reasonable person would attach importance to Defendant's misrepresentations in determining  
14 whether to purchase the products at issue.

15 78. A reasonable person would also attach importance to whether Defendant's products  
16 were legally salable, and capable of legal possession, and to Defendant's representations about  
17 these issues in determining whether to purchase the products at issue. Plaintiff would not have  
18 purchased Defendant's Misbranded Food Products had Plaintiff known they were not capable of  
19 being legally sold or held.

20 79. As a result of Defendant's unlawful use of the terms "Organic Dehydrated Cane  
21 Juice" or "Organic Evaporated Cane Juice or "yogurt," and its use of unlawful coconut related  
22 health claims, Plaintiff and the Class members purchased the Misbranded Food Products at issue.  
23 Plaintiff and the Class members have been proximately harmed, and Defendant has been unjustly  
24 enriched, by Defendant's deceptive and unlawful scheme.

### 25 **CLASS ACTION ALLEGATIONS**

26 80. Plaintiff brings this action as a class action pursuant to Federal Rule of Procedure  
27 23(b)(2) and 23(b)(3) on behalf of the following class:

28 All persons in the United States, and alternatively, a sub-class of all persons in



1 California who, within the last four years, purchased Defendant's coconut products  
 2 or its products labeled with the ingredient "Organic Dehydrated Cane Juice" or  
 3 "Organic Evaporated Cane Juice" (the "Class").

4 81. The following persons are expressly excluded from the Class:  
 5 (1) Defendant and its subsidiaries and affiliates; (2) all persons who make a timely election  
 6 to be excluded from the proposed Class; (3) governmental entities; and (4) the Court to  
 7 which this case is assigned and its staff.

8 82. This action can be maintained as a class action because there is a well-defined  
 9 community of interest in the litigation and the proposed Class is easily ascertainable.

10 83. Numerosity: Based upon Defendant's publicly available sales data with respect to  
 11 the misbranded products at issue, it is estimated that the Class numbers in the thousands, and that  
 12 joinder of all Class members is impracticable.

13 84. Common Questions Predominate: This action involves common questions of law  
 14 and fact applicable to each Class member that predominate over questions that affect only  
 15 individual Class members. Thus, proof of a common set of facts will establish the right of each  
 16 Class member to recover. Questions of law and fact common to each Class member include, just  
 17 for example:

- 18 a. Whether Defendant engaged in unlawful, unfair or deceptive  
 19 business practices by failing to properly package and label its  
 20 Misbranded Food Products sold to consumers;
- 21 b. Whether the food products at issue were misbranded as a matter of  
 22 law;
- 23 c. Whether Defendant made unlawful and misleading "Organic  
 24 Dehydrated Cane Juice" and "Organic Evaporated Cane Juice or  
 25 health claims with respect to food products sold to consumers;
- 26 d. Whether Defendant violated California Bus. & Prof. Code § 17200,  
 27 *et seq.*, California Bus. & Prof. Code § 17500, *et seq.*, the  
 28 Consumers Legal Remedies Act, Cal. Civ. Code §1750, *et seq.*,  
 California Civ. Code § 1790, *et seq.*, 15 U.S.C. § 2301, *et seq.*, and  
 the Sherman Law;
- e. Whether Plaintiff and the Class are entitled to equitable and/or  
 injunctive relief;
- f. Whether Defendant's unlawful, unfair and/or deceptive practices



1 harmed Plaintiff and the Class; and

2 g. Whether Defendant was unjustly enriched by its deceptive practices.

3  
4 85. Typicality: Plaintiff's claims are typical of the claims of the Class because Plaintiff  
5 bought Defendant's Misbranded Food Products during the Class Period. Defendant's unlawful,  
6 unfair and/or fraudulent actions concern the same business practices described herein irrespective  
7 of where they occurred or were experienced. Plaintiff and the Class sustained similar injuries  
8 arising out of Defendant's conduct in violation of California law. The injuries of each member of  
9 the Class were caused directly by Defendant's wrongful conduct. In addition, the factual  
10 underpinning of Defendant's misconduct is common to all Class members and represents a  
11 common thread of misconduct resulting in injury to all members of the Class. Plaintiff's claims  
12 arise from the same practices and course of conduct that give rise to the claims of the Class  
13 members and are based on the same legal theories.

14 86. Adequacy: Plaintiff will fairly and adequately protect the interests of the Class.  
15 Neither Plaintiff nor Plaintiff's counsel have any interests that conflict with or are antagonistic to  
16 the interests of the Class members. Plaintiff has retained highly competent and experienced class  
17 action attorneys to represent her interests and those of the members of the Class. Plaintiff and  
18 Plaintiff's counsel have the necessary financial resources to adequately and vigorously litigate this  
19 class action, and Plaintiff and counsel are aware of their fiduciary responsibilities to the Class  
20 members and will diligently discharge those duties by vigorously seeking the maximum possible  
21 recovery for the Class.

22 87. Superiority: There is no plain, speedy or adequate remedy other than by  
23 maintenance of this class action. The prosecution of individual remedies by members of the Class  
24 will tend to establish inconsistent standards of conduct for Defendant and result in the impairment  
25 of Class members' rights and the disposition of their interests through actions to which they were  
26 not parties. Class action treatment will permit a large number of similarly situated persons to  
27 prosecute their common claims in a single forum simultaneously, efficiently, and without the  
28 unnecessary duplication of effort and expense that numerous individual actions would engender.

Further, as the damages suffered by individual members of the Class may be relatively small, the expense and burden of individual litigation would make it difficult or impossible for individual members of the Class to redress the wrongs done to them, while an important public interest will be served by addressing the matter as a class action. Class treatment of common questions of law and fact would also be superior to multiple individual actions or piecemeal litigation in that class treatment will conserve the resources of the Court and the litigants, and will promote consistency and efficiency of adjudication.

88. The prerequisites to maintaining a class action for injunctive or equitable relief pursuant to Fed. R. Civ. P. 23(b)(2) are met as Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive or equitable relief with respect to the Class as a whole.

89. The prerequisites to maintaining a class action pursuant to Fed. R. Civ. P. 23(b)(3) are met as questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

90. Plaintiff and Plaintiff's counsel are unaware of any difficulties that are likely to be encountered in the management of this action that would preclude its maintenance as a class action.

### **CAUSES OF ACTION**

#### **FIRST CAUSE OF ACTION**

#### **Business and Professions Code § 17200 *et seq.***

#### **Unlawful Business Acts and Practices**

91. Plaintiff incorporates by reference each allegation set forth above.

92. Defendant's conduct constitutes unlawful business acts and practices.

93. Defendant sold Misbranded Food Products in California and throughout the United States during the Class Period.

94. Defendant is a corporation and, therefore, a "person" within the meaning of the Sherman Law.

95. Defendant's business practices are unlawful under § 17200 *et seq.* by virtue of

1 Defendant's violations of the advertising provisions of Article 3 of the Sherman Law and the  
2 misbranded food provisions of Article 6 of the Sherman Law.

3 96. Defendant's business practices are unlawful under § 17200 *et seq.* by virtue of  
4 Defendant's violations of § 17500 *et seq.*, which forbids untrue and misleading advertising.

5 97. Defendant's business practices are unlawful under § 17200 *et seq.* by virtue of  
6 Defendant's violations of the Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*

7 98. Defendant sold Plaintiff and the Class Misbranded Food Products that were not  
8 capable of being sold or held legally and which had no economic value and were legally worthless.  
9 Plaintiff and the Class paid a premium for the Misbranded Food Products.

10 99. As a result of Defendant's illegal business practices, Plaintiff and the Class, pursuant  
11 to Business and Professions Code § 17203, are entitled to an order enjoining such future conduct  
12 and such other orders and judgments which may be necessary to disgorge Defendant's ill-gotten  
13 gains and to restore to any class member any money paid for the Misbranded Food Products.

14 100. Defendant's unlawful business acts present a threat and reasonable continued  
15 likelihood of injury to Plaintiff and the Class.

16 101. As a result of Defendant's conduct, Plaintiff and the Class, pursuant to Business and  
17 Professions Code § 17203, are entitled to an order enjoining such future conduct by Defendant, and  
18 such other orders and judgments which may be necessary to disgorge Defendant's ill-gotten gains  
19 and restore any money paid for Defendant's Misbranded Food Products by Plaintiff and the Class.

20  
21 **SECOND CAUSE OF ACTION**  
22 **Business and Professions Code § 17200 *et seq.***  
**Unfair Business Acts and Practices**

23 102. Plaintiff incorporates by reference each allegation set forth above.

24 103. Defendant's conduct as set forth herein constitutes unfair business acts and practices.

25 104. Defendant sold Misbranded Food Products in California and throughout the United  
26 States during the Class Period.

27 105. Plaintiff and members of the Class suffered a substantial injury by virtue of buying  
28 Defendant's Misbranded Food Products that they would not have purchased absent Defendant's

1 illegal conduct.

2 106. Defendant's deceptive marketing, advertising, packaging and labeling of  
3 Misbranded Food Products and sale of unsalable misbranded products that were illegal to possess  
4 was of no benefit to Plaintiff and members of the Class, and the harm to consumers is substantial.

5 107. Defendant sold Plaintiff and the Class Misbranded Food Products that were not  
6 capable of being legally sold or held and that had no economic value and were legally worthless.  
7 Plaintiff and the Class paid a premium price for the Misbranded Food Products.

8 108. Plaintiff and the Class who purchased Defendant's Misbranded Food Products had  
9 no way of reasonably knowing that the products were misbranded and were not properly marketed,  
10 advertised, packaged and labeled, and thus could not have reasonably avoided the injury each of  
11 them suffered.

12 109. The consequences of Defendant's conduct as set forth herein outweigh any  
13 justification, motive or reason therefor. Defendant's conduct is and continues to be unlawful,  
14 illegal, immoral, unethical, unscrupulous, contrary to public policy, and is substantially injurious to  
15 Plaintiff and the Class.

16 110. Pursuant to Business and Professions Code § 17203, as a result of Defendant's  
17 conduct, Plaintiff and the Class, are entitled to an order enjoining such future conduct by  
18 Defendant, and such other orders and judgments which may be necessary to disgorge Defendant's  
19 ill-gotten gains and restore any money paid for Defendant's Misbranded Food Products by Plaintiff  
20 and the Class.

21  
22 **THIRD CAUSE OF ACTION**  
23 **Business and Professions Code § 17200 *et seq.***  
**Fraudulent Business Acts and Practices**

24 111. Plaintiff incorporates by reference each allegation set forth above.

25 112. Defendant's conduct as set forth herein constitutes fraudulent business practices  
26 under California Business and Professions Code sections § 17200 *et seq.*

27 113. Defendant sold Misbranded Food Products in California and throughout the United  
28 States during the Class Period.

114. Defendant's misleading marketing, advertising, packaging and labeling of the Misbranded Food Products and misrepresentations that the products were salable, capable of possession and not misbranded were likely to deceive reasonable consumers, and in fact, Plaintiff and members of the Class were deceived. Defendant has engaged in fraudulent business acts and practices.

115. Defendant's fraud and deception caused Plaintiff and the Class to purchase Defendant's Misbranded Food Products that they would otherwise not have purchased had they known the true nature of those products.

116. Defendant sold Plaintiff and the Class Misbranded Food Products that were not capable of being sold or held legally and that had no economic value and were legally worthless. Plaintiff and the Class paid a premium price for the Misbranded Food Products.

117. As a result of Defendant's conduct as set forth herein, Plaintiff and the Class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future conduct by Defendant, and such other orders and judgments which may be necessary to disgorge Defendant's ill-gotten gains and restore any money paid for Defendant's Misbranded Food Products by Plaintiff and the Class.

**FOURTH CAUSE OF ACTION**  
**Business and Professions Code § 17500 *et seq.***  
**Misleading and Deceptive Advertising**

118. Plaintiff incorporates by reference each allegation set forth above.

119. Plaintiff asserts this cause of action for violations of California Business and Professions Code § 17500 *et seq.* for misleading and deceptive advertising against Defendant.

120. Defendant sold Misbranded Food Products in California and throughout the United States during the Class Period.

121. Defendant engaged in a scheme of offering Misbranded Food Products for sale to Plaintiff and members of the Class by way of, *inter alia*, product packaging and labeling, and other promotional materials. These materials misrepresented and/or omitted the true contents and nature of Defendant's Misbranded Food Products. Defendant's advertisements and inducements were made within California and throughout the United States and come within the definition of

1 advertising as contained in Business and Professions Code §17500 *et seq.* in that such product  
2 packaging and labeling, and promotional materials were intended as inducements to purchase  
3 Defendant's Misbranded Food Products and are statements disseminated by Defendant to Plaintiff  
4 and the Class that were intended to reach members of the Class. Defendant knew, or in the exercise  
5 of reasonable care should have known, that these statements were misleading and deceptive as set  
6 forth herein.

7 122. In furtherance of its plan and scheme, Defendant prepared and distributed within  
8 California and nationwide via product packaging and labeling, and other promotional materials,  
9 statements that misleadingly and deceptively represented the composition and the nature of  
10 Defendant's Misbranded Food Products. Plaintiff and the Class necessarily and reasonably relied  
11 on Defendant's materials, and were the intended targets of such representations.

12 123. Defendant's conduct in disseminating misleading and deceptive statements in  
13 California and nationwide to Plaintiff and the Class was and is likely to deceive reasonable  
14 consumers by obfuscating the true composition and nature of Defendant's Misbranded Food  
15 Products in violation of the "misleading prong" of California Business and Professions Code  
16 §17500 *et seq.*

17 124. As a result of Defendant's violations of the "misleading prong" of California  
18 Business and Professions Code § 17500 *et seq.*, Defendant has been unjustly enriched at the  
19 expense of Plaintiff and the Class. Misbranded products cannot be legally sold or held, have no  
20 economic value and are legally worthless. Plaintiff and the Class paid a premium price for the  
21 Misbranded Food Products.

22 125. Plaintiff and the Class, pursuant to Business and Professions Code § 17535, are  
23 entitled to an order enjoining such future conduct by Defendant, and such other orders and  
24 judgments which may be necessary to disgorge Defendant's ill-gotten gains and restore any money  
25 paid for Defendant's Misbranded Food Products by Plaintiff and the Class.



**FIFTH CAUSE OF ACTION**  
**Business and Professions Code § 17500 *et seq.***  
**Untrue Advertising**

126. Plaintiff incorporates by reference each allegation set forth above.

127. Plaintiff asserts this cause of action against Defendant for violations of California Business and Professions Code § 17500 *et seq.* regarding untrue advertising.

128. Defendant sold Misbranded Food Products in California and throughout the United States during the Class Period.

129. Defendant engaged in a scheme of offering Defendant's Misbranded Food Products for sale to Plaintiff and the Class by way of product packaging and labeling, and other promotional materials. These materials misrepresented and/or omitted the true contents and nature of Defendant's Misbranded Food Products. Defendant's advertisements and inducements were made in California and throughout the United States and come within the definition of advertising as contained in Business and Professions Code §17500 *et seq.* in that the product packaging and labeling, and promotional materials were intended as inducements to purchase Defendant's Misbranded Food Products, and are statements disseminated by Defendant to Plaintiff and the Class. Defendant knew, or in the exercise of reasonable care should have known, that these statements were untrue.

130. In furtherance of its plan and scheme, Defendant prepared and distributed in California and nationwide via product packaging and labeling, and other promotional materials, statements that falsely advertise the composition of Defendant's Misbranded Food Products, and falsely misrepresented the nature of those products. Plaintiff and the Class were the intended targets of such representations and would reasonably be deceived by Defendant's materials.

131. Defendant's conduct in disseminating untrue advertising throughout California deceived Plaintiff and members of the Class by obfuscating the contents, nature and quality of Defendant's Misbranded Food Products in violation of the "untrue prong" of California Business and Professions Code § 17500.

132. As a result of Defendant's violations of the "untrue prong" of California Business and Professions Code § 17500 *et seq.*, Defendant has been unjustly enriched at the expense of



1 Plaintiff and the Class. Misbranded products cannot be legally sold or held, have no economic  
2 value, and are legally worthless. Plaintiff and the Class paid a premium price for the Misbranded  
3 Food Products.

4 133. Plaintiff and the Class, pursuant to Business and Professions Code § 17535, are  
5 entitled to an order enjoining such future conduct by Defendant, and such other orders and  
6 judgments which may be necessary to disgorge Defendant's ill-gotten gains and restore any money  
7 paid for Defendant's Misbranded Food Products by Plaintiff and the Class.

8  
9 **SIXTH CAUSE OF ACTION**  
**Consumers Legal Remedies Act, Cal. Civ. Code §1750 et seq.**

10 134. Plaintiff incorporates by reference each allegation set forth above.

11 135. This cause of action is brought pursuant to the CLRA. Plaintiff does not currently  
12 seek monetary damages for this cause of action and this cause of action is limited solely to  
13 injunctive relief. Plaintiff intends to amend this Complaint to seek damages in accordance with the  
14 CLRA after providing Defendant with notice pursuant to Cal. Civ. Code § 1782.

15 136. At the time of any amendment seeking damages under the CLRA, Plaintiff will  
16 demonstrate that the violations of the CLRA by Defendant were willful, oppressive and fraudulent,  
17 thus supporting an award of punitive damages.

18 137. Consequently, Plaintiff and the Class will be entitled to actual and punitive damages  
19 against Defendant for its violations of the CLRA. In addition, pursuant to Cal. Civ. Code §  
20 1782(a)(2), Plaintiff and the Class will be entitled to an order enjoining the above-described acts  
21 and practices, providing restitution to Plaintiff and the Class, ordering payment of costs and  
22 attorneys' fees, and any other relief deemed appropriate and proper by the Court pursuant to Cal.  
23 Civ. Code § 1780.

24 138. Defendant's actions, representations and conduct have violated, and continue to  
25 violate the CLRA, because they extend to transactions that are intended to result, or which have  
26 resulted, in the sale of goods to consumers.

27 139. Defendant sold Misbranded Food Products in California and throughout the United  
28 States during the Class Period.

140. Plaintiff and members of the Class are “consumers” as that term is defined by the CLRA in Cal. Civ. Code §1761(d).

141. Defendant’s Misbranded Food Products were and are “goods” within the meaning of Cal. Civ. Code §1761(a).

142. By engaging in the conduct set forth herein, Defendant violated and continues to violate Section 1770(a)(5) of the CLRA because Defendant’s conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices in that they misrepresent the particular ingredients, characteristics, uses, benefits and quantities of the goods.

143. By engaging in the conduct set forth herein, Defendant violated and continues to violate Section 1770(a)(7) of the CLRA, because Defendant’s conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices in that they misrepresent the particular standard, quality or grade of the goods.

144. By engaging in the conduct set forth herein, Defendant violated and continues to violate Section 1770(a)(9) of the CLRA, because Defendant’s conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices in that they advertise goods with the intent not to sell the goods as advertised.

145. By engaging in the conduct set forth herein, Defendant violated and continues to violate Section 1770(a)(16) of the CLRA, because Defendant’s conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices in that they represent that a subject of a transaction has been supplied in accordance with a previous representation when it has not.

146. Plaintiff requests that the Court enjoin Defendant from continuing to employ the unlawful methods, acts and practices alleged herein pursuant to Cal. Civ. Code § 1780(a)(2). If Defendant is not restrained from engaging in these practices in the future, Plaintiff and the Class will continue to suffer harm.

**SEVENTH CAUSE OF ACTION**  
**Restitution Based on Unjust Enrichment/Quasi-Contract**

147. Plaintiff incorporates by reference each allegation set forth above.

148. As a result of Defendant’s fraudulent and misleading labeling, advertising,

1 marketing and sales of Defendant's Misbranded Food Products, Defendant was enriched at the  
2 expense of Plaintiff and the Class.

3 149. Defendant sold Misbranded Food Products to Plaintiff and the Class that were not  
4 capable of being sold or held legally and which had no economic value and were legally worthless.  
5 It would be against equity and good conscience to permit Defendant to retain the ill-gotten benefits  
6 it received from Plaintiff and the Class, in light of the fact that the products were not what  
7 Defendant purported them to be. Thus, it would be unjust and inequitable for Defendant to retain  
8 the benefit without restitution to Plaintiff and the Class of all monies paid to Defendant for the  
9 products at issue.

10 150. As a direct and proximate result of Defendant's actions, Plaintiff and the Class have  
11 suffered damages in an amount to be proven at trial.

12 **JURY DEMAND**

13 Plaintiff hereby demands a trial by jury of all claims.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, and on  
16 behalf of the general public, prays for judgment against Defendant as follows:

17 A. For an order certifying this case as a class action and appointing Plaintiff and  
18 Plaintiff's counsel to represent the Class;

19 B. For an order awarding, as appropriate, damages, restitution or disgorgement to  
20 Plaintiff and the Class for all causes of action other than the CLRA, as Plaintiff does not seek  
21 monetary relief under the CLRA, but intends to amend this Complaint to seek such relief;

22 C. For an order requiring Defendant to immediately cease and desist from selling  
23 Misbranded Food Products in violation of law; enjoining Defendant from continuing to market,  
24 advertise, distribute, and sell these products in the unlawful manner described herein; and ordering  
25 Defendant to engage in corrective action;

26 D. For all equitable remedies available pursuant to Cal. Civ. Code § 1780;

27 E. For an order awarding attorneys' fees and costs;

28 F. For an order awarding punitive damages;

1 G. For an order awarding pre-and post-judgment interest; and

2 H. For an order providing such further relief as this Court deems proper.

3  
4 Dated: January 17, 2013

Respectfully submitted,

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6 Ben F. Pierce Gore (SBN 128515)

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